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ABSTRACT

This paper discuses whether outrageous parodies are and should be protected under the First Amendment. After presenting a definition and a brief history of parody humor, the paper then presents a brief description of the parties to this line of legal controversies. The paper describes the rationale of a line of separate parody cases involving Miss Wyoming, Jerry Falwell, Peggy Ault, Dorchen Leidholdt, and Andrea Dworkin regarding various parodies published in the sexually explicit magazines "Penthouse" and "Hustler." The paper next critiques the rationales of the court rulings in each of the cases, suggesting that court rulings were based on the ability of the masses to discern the difference between fact and fiction, between parody and factual news items. Noting that for parody to be effective, the audience must be aware of the subject being ridiculed as well as the fact that the presentation is a parody on the subject, the paper observes that adults have often been deceived by hoaxes spread over the mass media and that even college students often demonstrate a lack of political and historical knowledge needed to discern fact from fiction. The paper suggests that the warning of parody should be conspicuous. The paper concludes that the type and realism of parodies can increase with the advent of low-cost, high-quality video graphics, and that further research must develop specific warnings/notices on parodies. (Contains 31 references.) (RS)

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The Evolution of Parody
From Miss Wyoming to Andrea Dworkin

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Introduction

American political history is vibrant with examples of political rhetoric which is less than flattering. Chief Justice Rehnquist noted "Despite their sometimes caustic nature, from the early cartoons portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate....From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them" [Falwell II at 54].

This paper discusses whether outrageous parodies are and should be protected under the First Amendment. I will first define and give a brief history of parody humor. Second, I will briefly describe the parties to this line of legal controversies. Third, I will describe the rationales of these parody cases. Fourth, I will critique the rationales. Fifth, I will call for

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new standards dealing with parody humor. I will conclude by offering an outlook for further research.

I. Parody Defined And A Brief History.

Webster's defines parody as "a feeble or ridiculous imitation" [page 827]. This requires us to answer the question, "What is ridiculous?" Ridiculous is defined as "laughable, arousing or deserving ridicule, absurd, preposterous" [Webster's at 989]. Both of these definitions are from the audience's perspective, not the speaker's perspective. For parody to be effective, the audience must be aware of the subject being ridiculed as well as the fact that the presentation is a parody on that subject. If the audience thinks the comic is serious, or if the audience is uncertain, the parody's effect is ruined. In early parodies, caricatures, the parody is obvious.

The early history of parody is both informative and entertaining. Hess & Kaplan's The Ungentlemanly Art: A History of American Political Cartoons gives an excellent history of early America's use of parody [1968]. From Franklin's cartoon of a segmented snake representing the colonies to Thomas Nast's cartoons of Boss Tweed to James Montgomery Flagg's Uncle Sam, cartoons have been a vibrant part of our political history. Although entertaining to the masses, they are rarely so to the parties being parodied. A constant theme to cartoonists is to belittle the subjects, which are typically political figures. For example, the Civil War saw many caustic attacks on President

Lincoln. He was seen as a clown, a gambler, a puppeteer and a confused lion [Hess & Kaplan 1968].

From recent political history, it appears that almost anything goes. Statements once libelous are commonplace. A perfect example was the Santa Monica, California mayor's race of 1982. This trivial local race turned into a verbal bloodbath when Ilse Koch, interviewed on 60 Minutes, explained that Incumbent Ruth Goldway was a "Communist" since she supported rent controls [ABAJ at 124]. Goldway counter-attacked in a speech to the Los Angeles Jewish Federation Council where she stated that a Nazi war criminal named Ilse Koch had never been found [Koch v. Goldway].

Name-calling is not just in campaigns. Bertell Ollman, a political science professor, sued Rowland Evans and Robert Novak over one of their newspaper columns which described him as a "Marxist" [Ollman at 972]. William F. Buckley Jr., brought suit against Dr. Franklin H. Littell for having called him a "fascist" [Buckley v. Littell]. Darrel "Mouse" Davis, coach for the Denver Gold football team, called J. Harrison Henderson, an agent for players, a "sleaze-bag agent...[who] slimed up from the bayou" [Henderson v. Times Mirror Co.]. All of these were considered statements of opinion and therefore given complete protection under the First Amendment.

The difficulty of parody is that the audience must understand the humor. The audience must understand that the state-

ments within the parody are not literally true, but are simply offered for entertainment. The early caricatures were easy to discern from fact. Pen and ink drawings certainly conveyed to the audience that it was fiction. The characters were exaggerated in the cartoons. However, as technology has increased, the ability to deceive the audience has increased. The first drastic change was photography. Pictures could be manipulated to make it appear that you were talking to Elvis, landing on he moon, or standing next to the President at the steps of the White House. Now, with computer graphics, any person can imitate advertisements very accurately, even potentially deceiving the makers of those ads. These cases involve this evolution of technology, from cartoons to enhanced computer imaging to imitate common advertisements.

II. The Legal Controversy.

The specific parties to these controversies epitomize the definition of polar opposites. On one side is Larry Flynt, the flamboyant owner of Hustler Magazine, and his competition, Penthouse Magazine. Both Hustler and Penthouse are noted for graphic sexual content and off-color cartoons and parody news articles. Offensive language is nothing new to these two. Larry Flynt makes this perfectly clear: "The First Amendment gives me the right to be offensive" [Sneed 1988].

On the other side are Kim Pring, a former Miss Wyoming, who until the present controversy was relatively unknown, and Jerry

Falwell, Peggy Ault, Dorchen Leidholdt and Andrea Dworkin, leaders in the religious and the feminist crusade to ban pornography. Falwell is the founder of the now-defunct Moral Majority and a crusading minister. Ault is active in Citizens for Legislation Against Decadence (CLAD) and founded the Citizens in Action for Clackamas County, Oregon (CACCO?). Leidholdt is a founding member of Women Against Pornography and has given speeches and public debates on the issue of pornography regulation. Andrea Dworkin is an outspoken feminist activist and anti-pornography crusader. She is the author of many works, including Pornography: Men Possessing Women. She was prominent in passage of the Indianapolis ordinance against pornography, which was declared unconstitutional [American Booksellers at 323].

III. The Rationale of a Line of Parody Cases.

A. The Miss Wyoming Case

Around 1980, Penthouse published a fictional story of "Charlene" - a "Miss Wyoming" who was such an expert at fellatio that she could cause men to levitate [Pring at 441]. Although fictional, the story caused Kim Pring, the true Miss Wyoming, to be humiliated. She brought suit against Penthouse and the jury awarded her $26,000,000 [Spence at 52]. The Tenth Circuit found the article "a gross, unpleasant, crude distorted attempt to ridicule the Miss America contest and contestants. It has no redeeming features whatsoever" [Pring at 443]. However, the

court reversed the trial verdict stating that since the article was complete fiction, "obviously a complete fantasy," it could not support a libel action [Pring at 443].

B. The Falwell Parody

In November of 1983, Hustler parodied a Campari Liqueur ad. Campari's ads, which consisted of interviews with celebrities who discussed their first time (drinking Campari Liqueur), had an obvious sexual double entendre. Hustler's parody, identical to the real ad, was titled "Jerry Falwell talks about his first time." In the parody, Rev. Falwell states that his "first time" was a drunken incestuous rendezvous with his mother in the family outhouse [Falwell II at 47]. The parody further described his mother as a promiscuous drunkard and stated Rev. Falwell only preaches while intoxicated [Falwell II at 47]. The parody had a disclaimer at the bottom of the ad which read: "Ad parody -- not to be taken seriously."

After publication, a newspaper reporter showed the parody to Falwell, who immediately filed suit. Flynt, not to be intimidated, re-ran the parody in the March, 1984 issue of Hustler. Surprisingly, while Rev. Falwell was allegedly troubled over the parody, he worked 12 hours a day [Garneau at 9] and raised nearly a million dollars in the Anti-Flynt fund-raising campaign alone [Langvardt at 689; Hustler I at 1530].

The jury awarded Falwell $200,000 on the emotional distress

claim, where actual malice is not required [Falwell I at 1272]. At the Court of Appeals, Flynt argued that the actual malice standard should apply to both libel and emotional distress claims, since Falwell is a public figure. The Court stated that New York Times v. Sullivan (which applied actual malice to libel actions) "gives the press protection from honest mistakes, but it is not a license to lie" [Falwell I at 1275]. Finding the allegations in the parody false, and finding the parody outrageous and made with the intent to harm Falwell, the Court affirmed the decision of the trial court. Flynt again sought appeal.

The United States Supreme Court had to decide if the First Amendment limits emotional distress claims of public figures. A unanimous Supreme Court agreed with Flynt.[1] The Court noted although "society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection" [Falwell II at 52, citations omitted].

The Court concluded that the marketplace of ideas is better preserved by allowing offensive and shocking speech than by prohibiting and establishing liability for speech which harms the sensibilities of public figures. Breathing space for the First Amendment requires as much. Accordingly, the actual malice standard should be applied to emotional distress claims. The Court's decision made it more difficult for public figures to stifle

criticism and satire [Taylor 1988] by stopping emotional distress claims, a shortcut for libel actions [Langvardt at 666]. By giving a unanimous decision, the Supreme Court was telling the legal community that these First Amendment issues are settled and are not going to be reopened for a long time [Lewis 1988].

The Court strongly re-affirmed Sullivan, which protects those who criticize public figures [Jones 1988]. The Court was unable, notes First Amendment attorney Richard Winfield, to fashion a law which can distinguish between offensive and non-offensive political parody [Garneau at 45]. This type of distinction is nearly impossible to make without violating the First Amendment.

All parody is offensive, at least to the subject of the parody. Parody is not for the thin-skinned. The Court notes "The art of the cartoonist is often not reasoned or even-handed, but slashing and one-sided" [Falwell II at 51]. Despite the emotional trauma they cause, "graphic depictions and satirical cartoons have played a prominent role in public and political debate" [Falwell II at 51].

Gerry Spence, a plaintiff's libel attorney, argued that the Supreme Court destroyed the rights of all Americans. He argues the First Amendment concerns are a facade. He stated: "That Flynt should be permitted to spread his vicious obscenities to millions under the protection of the law while the courts deny his victims any remedy speaks most eloquently of the state of the

judiciary's priorities" [Spence at 56].

However, his vigorous defense of the downtrodden must be discounted by his self-interests. Mr. Spence represented both Kim Pring's (Miss Wyoming) and Andrea Dworkin's (discussed later) failed libel suits [Pring at 438]. Mr. Spence's ego and financial status suffered greatly as a result. In fact, Mr. Spence claims that losing the case against Penthouse gave Hustler the authority to parody Reverend Falwell [Spence at 52]. Further, Mr. Spence's own libel suit against Hustler was dismissed [Spence at 1266]. Mr. Spence was parodied for representing unsuccessful libel plaintiffs against Hustler. Norman Roy Grutman, Falwell's attorney, was as disheartened as Mr. Spence. He noted that the Court created "A new kind of tyranny of people like Larry Flynt who can now do whatever they want to any public figure with impunity" [Garneau at 45].

The Association of American Editorial Cartoonists, the Authors League of America and political comedian Mark Russell filed an amicus curiae brief in the libel action. They argued that political satire has a long and important history in the United States. To put it another way, "a newspaper without healthy, unfettered opinion writing and cartooning is like a salad without dressing" [Sneed 1988]. Allowing recovery for a parody would open the floodgates for political figures to sue cartoonists and comedians. The chilling effect is more troublesome than the lawsuits.

For instance, many newspapers canceled a 1985 "Doonsebury" series which made fun of Frank Sinatra for fear of libel suits [Sneed 1988]. However, this chilling effect is overstated. The American media have a long history of success in the courts. On average, the news media lose less than 10% of appealed libel cases and no political cartoonist has lost a libel suit [Sneed 1988]. It is questionable to treat this parody the same as a typical cartoon. The Court notes that the parody was, at best, a "distant cousin" of mainstream political satire [Falwell II at 51].

C. The Hustler Trilogy

I call these a trilogy since they involve the same party (Hustler) and that the Ninth Circuit decided all three cases during a six month period from October, 1988 to January, 1989. Three of Hustler's off-color comments spurred lawsuits. All three criticized outspoken, anti-pornography crusaders. One is a series of sexually graphic cartoons. Two of the cases involve a recurring pseudo-news feature of the magazine entitled "Asshole of the Month." In this feature, a picture of the featured person is superimposed over the rear-end of a naked man. A brief news article follows which explains their distinction. The feature fires personal barbs at political figures and, especially, anti-pornography activists.

Peggy Ault was the Asshole of the Month for April, 1985. The feature described Ault as a "tight-assed housewife," "frustrated," "threatened by sex," a "fanatic," a "crackpot," and a "deluded busybody." The feature also described her alliance as a "wacko group" who engage in censorship and intimidation tactics.

Ault's emotional distress claim failed because of the recent ruling in Falwell v. Flynt, which held that parody news features are protected statements of opinion [Falwell at 876]. The libel claim hinges on whether the features were portrayed as fact or opinion. The Court notes that this feature regularly lampoons pornography opponents, it is not a news column [Ault at 881]. These parodies are intended to be humorous, not to be factual accounts of real events. Without a false statement of fact, the libel action must fail.

Ault's other actions revolve around Hustler getting Ault's photo for the feature. Apparently, Hustler's staff got it from a newspaper photographer under questionable circumstances. The Court dismissed both actions since the photo was not Ault's property. Hustler did not use the photo to endorse a product. Instead it used the photo to further the discussion on a matter of public interest, which is constitutionally protected.

Leidholdt v. Flynt, et al.

Dorchen Leidholdt was the Asshole of the Month for June, 1985. The feature described Leidholdt as a "pus bloated walking sphincter" and "sexually repressed." The feature also described Women Against Pornography as "hating men, hating sex, and hating themselves," and a "frustrated group of sexual fascists."

The Ninth Circuit Court ruled one day after deciding Ault, holding the same as Ault. The libel and emotional distress claims fail since these parody items are protected statements of opinion, especially when taken in the context of the entire article. The commercial use of her image claim also failed since Hustler did not use the photo for a commercial purpose, but rather as part of a political discussion.

Dworkin, et al. v. Hustler, et al.

Dworkin was the subject of three different features in Hustler in 1984. The February feature is a cartoon of two women engaged in a lesbian act of oral sex. The caption read: "You remind me so much of Andrea Dworkin, Edna. It's a dog-eat-dog world." The March feature contains one photograph, which degrades a fictional Andrea Dworkin Fan Club.

The December feature entitled "Porn from the Past" showed a man performing oral sex on an obese woman while he masturbates. Part of the caption read: "We don't believe it for a minute, but one of our editors swears that this woman in the throes of ecsta-

sy is the mother of radical feminist Andrea Dworkin."

The Circuit Court entered its opinion within weeks of the other two cases. The Court ruled that Dworkin's libel action must fail. The features were not false statements of fact, but rather of opinion, fully protected under the First Amendment. These features are parody, not factual descriptions of news items. Therefore, the features could not be the basis of false statements of fact.

Armed with several legal victories, including a unanimous decision from the Supreme Court, Hustler's parodies will certainly get more graphic and more common. It should be natural that other publishers will follow, using parody which is more and more shocking.

IV. Critique of Supreme Court's Analysis.

A. The Court Does Not Better The Marketplace Of Ideas.

From the Court's rationale, everything stated as opinion, even if directed as a caustic, sexually-offensive insult, is protected under the First Amendment. However, this rationale creates much more incentive for falsehood. What would prevent a newspaper from running the following headline:

"DAN QUAYLE HAS HOMOSEXUAL LOVE FEST WITH ELVIS'S GHOST."

Of course, somewhere in the fine print of the story I would have to mention "this is a parody." Such a discussion would do nothing to advance the marketplace of ideas. However, the Hustler Court's rationale encourages these type of wild stories to be published with impunity.

The message is clear: do not tell the truth about a public figure, no matter how interesting. If you really want to discredit a public figure, parody them. Make up a shocking, scandalous lie (mentioning briefly that it is a parody) and you will be protected. The more outrageous the better, since then it is less likely that a reasonable person could believe it to be true, and hence not the basis for a libel action. Under the auspices of expanding the marketplace of ideas, these decisions encourage dishonesty about public figures, with the lone caveat that you must call it a parody in ultra-fine print.

B. The Masses Are Not Attentive Or Discerning.

The court's rationale make it clear these are protected. My question is should they be protected. Can the average citizen discern the difference between fact and fiction in a news article? One of the major assumptions of allowing people to print fiction about living persons is the belief that the audience is sophisticated enough to tell the difference. This assumption is completely inaccurate. To completely win this dispute, one should have to do little more than to utter "The War of the

Worlds."

A large portion of our population believed reports that the United States was being attacked by little green men from outer space because they heard it on the radio. Anyone who even vaguely believes our public is not completely gullible to falsehood should read the reports surrounding Orson Well's broadcast. Literally hundreds of panicked citizens called their local police to report actually seeing the aliens nearby. All of this was created in their minds by the vivid accounts which they heard over the radio.

Some would respond that out society has become much more sophisticated since the early days of radio and would not fall for such a spoof presently. Such a belief is little more than a dream. The public is so easily fooled that the Federal Communications Commission (FCC) has recently enacted a Anti-Hoax Rule [Washington Post 1992]. The Post listed some of the more successful hoaxes from radio.

> In March of 1989, KSLX-FM of Phoenix announced on the air that the station had been taken hostage. The police rushed to the scene to find it was only a hoax.
>
> In March of 1990, WCCC AM-FM of Avon, Connecticut, warned the residents to evacuate their homes because of a volcanic eruption nearby. There are no volcanoes near Avon.
>
> In June of 1990, KROQ-FM of Los Angeles had a call-in show in which a caller admitted he murdered his girlfriend. Police launched a massive investigation. NBC's Unsolved Mysteries did a story on the admission. After 10 months, the radio station admitted is was all a hoax.

> On April 1, 1991, (April Fool's Day), WNOR AM-FM of Virginia Beach warned the public that their local dump, Mount Trashmore, was about to explode due to a gas buildup under the landfill. The police were flooded with calls. There is no Mount Trashmore. [Post 1992]

Serious political figures are involved in parody as well. I am certain that everyone felt their heart sink in 1984 as Ronald Reagan (who thought he was talking into a dead microphone) told the national radio audience that "We begin bombing [Russia] in five minutes" [Washington Post 1992]. Watergate and Iran-Contra are two very timely examples of the public being completely deceived, at least in the short term. However, this short term is certainly long enough to win an election, sell a product or any other purpose.

This does not just affect the adult population, but also the population who are still in school. This group, in theory, should have the best recollection of history, politics and geography because they are presently learning it. The National Assessment of Educational Progress [NAEP] surveyed more than 1.4 million students to determine the advances made in education over the last 20 years. The results can be described only as an embarrassment. The NAEP study found: "In reading, 61 percent of 17-year-olds cannot understand...simple newspaper essays" [Vobejda 1989]. Over the last 20 years, "students did not demonstrate advances in thinking critically..." [Cooper 1990].

Secondary school students lack the historical and political knowledge to discern fact from fiction. The NAEP study found

that "two out of three students did not know the difference between a democracy and a dictatorship" [OBAJ 1990]. Another study found "less than two out of ten graduating seniors could write an extensive description of the President's responsibilities or would say why Columbus sailed for the Americas" [OBAJ 1990].

The report did not show a flattering view of college students either. Of the students from 67 different colleges, very few would have passed the history test which immigrants must pass for citizenship [Los Angeles Times 1989]. Almost half (42%) could not give the date for the U.S. Civil War within 50 years [Los Angeles Times 1989].

From high school to college to adults, the U.S. has demonstrated that we do not have a sophisticated public, partly because of apathy, partly because of ignorance. Regardless of which reason, we should not flood the public with misleading statements about public figures with the false hope that they can discern the truth. Encouraging outrageous falsehood is a danger sign for our political climate.

C. Notice Of The Parody Is Too Subtle.

The court specifies three (3) different things which are done which should indicate to the reader that the Falwell piece is a parody: the table of contents is nonsense, the warning on the page itself, and that the information is so ludicrous that

no one will believe it. My argument is that none of these alone are sufficient to warn the reader. Further, the combined effect does not warn the reader that this is parody. The third indication, the audience will know better, has already been discussed.

The first indication, the table of contents, is a farce. I would suspect very few readers of Hustler search the table of contents for parodies. I doubt if the number of readers would increase depending on the magazine. With today's format of magazines, with several articles on each page, the table of contents is meaningless. Often times, the table of contents just puts articles into subject types. Many of the modern news magazines do this, and the trend is growing. As a result, a listing on the table of contents is meaningless.

The second indication, the warning, is too small and is not conspicuous enough. The warning is smaller and of a different type print than the parody. In fact, the court notes how deceiving the parody is, because of its similarity to the actual ads. With computer generated graphics, as well as color scanners, it is now possible not to imitate the ad but to completely copy the ad and change the wording or pictures. A person with just a modest priced computer can do this at home. It is precisely because the parody can so closely mirror the original that we need more warning for the casual reader.

V. New Standards For Parody Humor.

I argue that the warning of parody should be conspicuous, similar to the warnings for the Fair Credit Act. That act requires consumer credit lenders to specify the annual percentage rate of the loan in annual terms and to make the warning conspicuous. In the reasoning for that Act, Congress noted how consumers are easily deceived and that they should be given a warning. The same holds true for these modern parodies. A reader who cannot figure out the annual percentage rate when given the monthly percentage rate could not discern fact from fantasy on political figures.

VI. Conclusion and Outlook For Further Research.

As our tabloid mentality runs rampant, we should expect many folks to step in and quench our thirst for tabloid style news. Public figures, aware of this mentality will be increasingly willing to make such outrageous statements to gain headlines. I have already witnessed tabloids which indicated all three of the major Presidential candidates had negotiations with Martians. These will grow in popularity and frequency since they have been ordained as sacred by our Supreme Court. Insinuating that these parodies increase the marketplace of ideas is a pitiful commentary on both the attention span of our public and how our court system has supported this change.

With the advent of low-cost, high-quality video graphics, the amount, type and realism of parodies can increase. Instead

of a altered photograph, the technology exists to allow a person to re-create actual video footage and change the face of the person in the action. It has already been done in feature films. It is in the process for video games. It is just a matter of time before it is used for comedic purposes.

It is not difficult to imagine a comic showing a video of the Vice-President's likeness in a police lineup; the Queen of England in a fight in a bowling alley; or even Elvis's face on the moon. In fact, the cover of the October, 1992 edition of Spy magazine had a photo of Bill Clinton super-imposed over the image of Superman while in flight. The new advance in technology will make parody even more realistic, and hence more deceptive. As a result, the need to inform the reader that the material is fiction is even more urgent. The courts must either make standards for notice of parody or be prepared for a wave of lawsuits. It is time for action.

Future investigation in this subject must develop specific warnings/notices on parodies. Such warnings must be able to inform the casual reader of the parody without changing the content and thereby running afoul of the First Amendment. Such restrictions must be carefully drawn. Without these notices, those who fall victim to the comedic wit of parody may lobby for bans on "indecent parodies" the same way others lobby for ratings on records. The only certainty is that technology is entering us into a new age of parody. Fact and fiction will be blurred, as both are equally as realistic. The legal arena must develop a

way to avoid misleading the public without interfering with the content of the discussion.

Unflattering parody is a large, historically significant part of our political culture. Whether it is a cartoon of the King of England or a "Saturday Night Live" re-enactment of the Presidential debates, it influences our political views. Parody can be effectively used to convey a political message. However, these parodies do not expand the marketplace of ideas and they encourage the dissemination of gross falsehoods which are not understood as false by our public.

For now, parodies, no matter how outlandish, are completely protected. Anything stated as opinion could be defended if it concerns a public issue. Americans should expect much more caustic (and inaccurate) attacks in all areas of public life, especially politics.

Endnotes

[1] The decision was 8-0, Justice White wrote a brief concurrence. Justice Kennedy took no part in the decision.

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